

Case T-340/04

France Télécom SA

v

Commission of the European Communities

(Competition — Decision ordering an inspection — Cooperation in good faith with national courts — Cooperation in good faith with national competition authorities — Article 20(4) of Regulation (EC) No 1/2003 — Statement of reasons — Proportionality — New plea — Inadmissible)

Judgment of the Court of First Instance (Fourth Chamber), 8 March 2007 . . . II - 579

Summary of the Judgment

1. *Competition — Administrative procedure — Commission's powers of inspection — Decision ordering an inspection — Obligation to state reasons — Scope (Council Regulation No 1/2003, Art. 20(4))*

2. *Competition — Administrative procedure — Decision ordering an inspection — Request for assistance addressed to national authorities*
(Council Regulation No 1/2003, Art. 20(7) and (8))
3. *Competition — Administrative procedure — Commission's powers of inspection — Duty of cooperation in good faith with national authorities — Decision ordering an inspection — Judicial review — Scope*
(Arts 10 EC, 81 EC and 82 EC; Council Regulation No 1/2003, Art. 20(4), (7) and (8))
4. *Competition — Distribution of powers between the Commission and the national competition authorities — Right of the Commission to decide to proceed with an inspection in a case pending before a national competition authority — Duty of cooperation in good faith with national authorities — Scope*
(Council Regulation No 1/2003, Arts 11(1) and (6) and 13(1))
5. *Competition — Administrative procedure — Commission's powers of inspection — Use of an inspection decision — Discretion of the Commission — Limits*
(Council Regulation No 1/2003, Art. 20)
6. *Procedure — Introduction of new pleas during the proceedings — Conditions*
(Rules of Procedure of the Court of First Instance, Arts 44(1)(c) and 48(2))

1. The decision by which the Commission, in the exercise of the powers conferred on it by Regulation No 1/2003 to ensure that undertakings comply with the Community competition rules, and on the basis of Article 20 of that regulation, orders an inspection must, under Article 20(4) of that regulation and the case-law, include a statement of reasons containing a certain number of essential elements so as to show that the investigation to be carried out on the premises of the undertakings concerned is justified and to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence. Thus, it must state the subject matter and the purpose of the inspection, setting out the essential

characteristics of the supposed infringement, identifying the market thought to be affected, the nature of the suspected infringements, explanations as to the relevant undertaking's degree of involvement in the infringement, what is being sought and the matters to which the inspection is to relate, the powers conferred on the Community investigators, the date on which the inspection is to start, the penalties provided for in Articles 23 and 24 of Regulation No 1/2003, and the possibility of bringing an action opposing the inspection before the Court of First Instance. The Commission is also required to state in a properly substantiated manner that it has in its file information and evidence providing reasonable grounds for sus-

pecting infringements of the competition rules by the relevant undertaking.

appear elsewhere than just in the decision ordering the inspection, or may be communicated to the national judicial authority by the Commission otherwise than in that decision.

The adequacy of the statement of reasons for such a decision must be assessed in the light of the context in which it was adopted.

(see para. 110)

(see paras 49-53, 58)

2. Under Article 20(8) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC], it is for the national judicial authority seised under Article 20(7) of that regulation to ensure that a Commission decision ordering an inspection is authentic and that the coercive measures envisaged for carrying out the inspection are not arbitrary or excessive having regard to the subject matter of the inspection, and that the Commission is to this end under a duty to provide the national judicial authority with certain information.

3. Regarding the inspections which the Commission may conduct in order to ensure that undertakings comply with Regulation No 1/2003, Article 20 of Regulation No 1/2003 establishes a clear distinction between the decisions adopted by the Commission under Article 20(4) and an application to the national judicial authority for assistance under Article 20(7).

None the less, it follows from Article 20(8) of Regulation No 1/2003 and the case-law that that information may

Although the Community Courts alone have jurisdiction to review the legality of a decision adopted by the Commission under Article 20(4) of the Regulation, it is, conversely, solely for the national court whose authorisation to employ coercive measures is sought under Article 20(7) of the Regulation, possibly assisted by the Court of Justice should the matter be referred to it for a preliminary ruling, and subject to any

national remedies, to determine whether the information sent by the Commission in connection with that request enables it to perform the control required by Article 20(8) of the Regulation, and so properly to determine the application presented to it.

The national judicial authority to which application is made under Article 20(7) of the Regulation may, under Article 20(8) and the case-law, request information from the Commission about, in particular, the grounds on which it suspects an infringement of Articles 81 EC and 82 EC, the gravity of the suspected infringement and the nature of the involvement of the undertaking concerned. A review by the Court of First Instance, which might in theory give rise to a finding that the information provided by the Commission to the authority was insufficient, would entail a re-appraisal by the Court of First Instance of the findings concerning the sufficiency of that information already made by the national judicial authority. Such a review cannot be permitted, as the national judicial authority's findings are amenable to review solely in accordance with the domestic remedies available in respect of the decisions of that authority.

The arguments which the relevant undertaking attempts to raise in support of an action directed against the Com-

mission's decision ordering an inspection must therefore be rejected as inoperative in so far as they allege that, contrary to the Commission's obligation to cooperate in good faith with the national authorities pursuant to Article 10 EC, that decision did not contain sufficient information to enable the national court, seised with a request for coercive measures, to give an informed ruling.

(see paras 119, 122-125)

4. Although Article 11(1) of Regulation No 1/2003 lays down a general rule to the effect that the Commission and the national authorities are required to cooperate closely, it does not require the Commission to refrain from making an inspection in a case which is being dealt with by a national competition authority in parallel.

Nor can it be inferred from that provision that where a national competition authority has begun an investigation into particular facts the Commission is immediately prevented from taking action in the case or taking a preliminary interest therein. On the contrary, it follows from the requirement of close collaboration laid down by that provision that both those authorities may, at

least in the preliminary stages such as investigations, work in parallel. So, it is clear from Article 11(6) of Regulation No 1/2003, on which the applicant relies, that the principle of cooperation implies that the Commission and the national competition authorities may, at least at the preliminary stages of cases in respect of which they have received a complaint, work in parallel. That provision in effect provides that, subject only to consulting the national authority concerned, the Commission retains the option of initiating proceedings with a view to adopting a decision even where a national authority is already dealing with the case. Therefore the Commission must, a fortiori, be able to carry out an inspection. A decision ordering an inspection is a step that is merely preliminary to dealing with the substance of the case, and does not have the effect of formally initiating proceedings within the meaning of Article 11(6) of Regulation No 1/2003; an inspection decision does not in itself demonstrate the Commission's intention to adopt a decision on the substance of the case.

Likewise, Article 13(1) of Regulation No 1/2003 merely gives the relevant authority the option of suspending proceedings or rejecting a complaint on the ground that another competition authority is dealing with the same matter. Not exercising that option cannot therefore constitute a failure by the Commission to cooperate in good faith

with the competition authorities of the Member States.

(see paras 128-130)

5. Observance of the principle of proportionality presumes that, when the Commission decides, on the basis of Article 20 of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC], to proceed with an inspection, the measures envisaged do not constitute, in relation to the aims thereby pursued, a disproportionate and intolerable interference. However, the choice to be made by the Commission between an investigation by straightforward authorisation and an investigation ordered by a decision does not depend on matters such as the particular seriousness of the situation, extreme urgency or the need for absolute discretion, but rather on the need for an appropriate inquiry, having regard to the special features of the case. Therefore where an investigation decision is solely intended to enable the Commission to gather the information needed to assess whether the Treaty has been infringed, such a decision is not contrary to the principle of proportionality.

It is in principle for the Commission to decide whether a particular item of

information is necessary to enable it to bring to light an infringement of the competition rules, and even if it already has some indicia, or indeed proof, of the existence of an infringement, the Commission may legitimately take the view that it is necessary to order further investigations enabling it to better define the scope of the infringement or to determine its duration.

(see paras 147, 148)

cation initiating proceedings must indicate the subject-matter of the dispute and set out in summary form the pleas raised and that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. The fact that the applicant became aware of a factual matter during the course of the procedure before the Court of First Instance does not mean that that element constitutes a matter of fact which came to light in the course of the procedure. A further requirement is that the applicant was not in a position to be aware of that matter previously.

6. It is clear from the provisions of Articles 44(1)(c) and 48(2) of the Rules of Procedure of the Court of First Instance, taken together, that the appli-

(see para. 164)